Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1182

THOMAS BROWN, *Petitioner*

v.

IVARANS REDERI, *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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No. 76-1182

Thomas Brown, *Petitioner*

v.

Ivarans Rederi, *A/S, Respondent*

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

ARGUMENT

I. There is no split of authority between the various Courts of Appeals as suggested by Petitioner.

Petitioner seeks to invoke the jurisdiction of this Court on writ of certiorari pursuant to Rule 19(1)(b) of the Rules of the Supreme Court of the United States which, in pertinent part, states:

> A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals *on the same matter* (emphasis added).

Petitioner asserts that there is a split of authority between various courts of appeals concerning application of §416 of the RESTATEMENT (SECOND) OF TORTS to a longshoreman's negligence cause of action against a shipowner under 33 U.S.C. §905(b). Alternatively, Petitioner asserts that there is a conflict between and within various courts of appeals concerning the standard of care owed by a shipowner to a longshoreman under 33 U.S.C. §905(b). Neither of Petitioner's assertions is well-founded.

The decision of the Third Circuit herein granting Respondent a new trial addressed a single issue, *viz.*, the propriety of instructions to the jury based on §416 of the RESTATEMENT (SECOND) OF TORTS in a longshoreman's action against a shipowner governed by 33 U.S.C. §905(b). The Third Circuit *held* that such instructions were improper because they were inconsistent with the express

language of §905(b) which does not permit a shipowner to be vicariously liable for the negligence of a stevedore.

Petitioner has cited no decision from another court of appeals which is in conflict with the issue decided by the Third Circuit herein. In fact, Petitioner has cited no other court of appeals decision that has addressed the issue.

There being no conflicting decisions between the various courts of appeals on the issue decided by the Third Circuit herein, Petitioner claims that a conflict exists between the Third Circuit decision herein and the decision of the District Court for Oregon in *Croshaw v. Koninklijke Nedlloyd, B. V. Rijswijk*, 398 F.Supp. 1224 (D.Ore. 1975). Notwithstanding that *Croshaw* is a decision of one of the many district courts within the appellate jurisdiction of the Ninth Circuit Court of Appeals, it is not in conflict with the Third Circuit holding herein. Petitioner's statement at pages 11-12 of his Petition that *Croshaw* "recognized that an application of Section 343 must also take into account, *inter alia*, Section 416 of the RESTATEMENT OF TORTS 2d when applicable and when the vessel owner has scienter" is erroneous. *Croshaw* neither considered nor decided whether §416 of the RESTATEMENT (SECOND) OF TORTS is a proper basis for imposing liability on a shipowner for the negligence of a stevedore under 33 U.S.C. §905(b). In fact, *Croshaw* did not discuss §416 of the RESTATEMENT (SECOND) OF TORTS. Rather, the District Court observed that: "The shipowner is not liable for dangerous conditions created by the stevedore's negligence while the stevedore has exclusive control over the manner and area of the work." 398 F.Supp. at 1229. In support of its observation, the District Court cited §409 of the RESTATEMENT (SECOND) OF TORTS. 398 F.Supp. at 1229-30. In passing, the District Court noted that the rule of §409 has exceptions and cited §§409-429 of the RESTATEMENT (SECOND) OF TORTS. The District Court did not hold, as suggested by Petitioner, that §416 of the RESTATEMENT (SECOND) OF TORTS is a permissible exception in longshoremen's negli-

gence actions against shipowners under 33 U.S.C. §905(b).

Not surprisingly, Petitioner failed to cite *Teofilovich v. d'Amico Mediterranean/Pacific Line*, 415 F. Supp. 732 (C.D.Cal. 1976), which was decided by a district court also within the appellate jurisdiction of the Ninth Circuit. *Teofilovich* specifically considered the issue decided by the Third Circuit herein. The *Teofilovich* holding is consistent with the Third Circuit holding herein.

With respect to Petitioner's alternative assertion that Third Circuit decisions are in conflict with decisions from other circuits on the proper standard of care to be applied to shipowners pursuant to 33 U.S.C. §905(b) actions, no conflict exists because the Third Circuit has not decided the standard of care issue either in the instant case or in *Marant v. Farrell Lines, Inc.*, — F.2d — (3d Cir. 1977) (A42-A61 of Petition for Writ of Certiorari herein) cited by Petitioner. Petitioner's statement at page 14 of his Petition that the Third Circuit has rejected §§343 and 343A of the RESTATEMENT (SECOND) OF TORTS, therefore, is incorrect.

After devoting the substantial portion of its Opinion to the reasons in support of its holding that §416 of the RESTATEMENT (SECOND) OF TORTS is not applicable to actions governed by 33 U.S.C. §905(b), the Third Circuit in *Brown*, in a brief concluding paragraph, volunteered *dicta* on the standard of care issue to be considered by the District Court on remand. That the comments of the Third Circuit on the standard of care issue are *dicta* is obvious from the express language used as follows:

> The parties in this case would have us *suggest to the district court* the standard of care a vessel owes to a longshoreman under the negligence remedy created by §905(b). *It would appear* that the principles of the law of negligence, as adopted in the admiralty field during the history of our country, are to form the basis of any recovery against shipowners insofar as

> such principles are not inconsistent with §905(b). 545 F.2d at 863 (emphasis added).

Within its *dicta* on the standard of care issue, the Third Circuit added footnote 10 in which it cited *Napoli v.* [*Transpacific Carriers, etc.*] *Hellenic Lines*, 536 F.2d 505 (2d Cir. 1976), and stated: "[W]e do not find it persuasive *on the facts presented by this appeal.*" 545 F.2d at 864, n. 10 (emphasis added).

It is submitted that the Third Circuit *dicta* in *Brown* is in the nature of an advisory opinion which is surprising in view of its earlier refusal in *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31 (3d Cir. 1975), to render an advisory opinion on the standard of care issue. There, the Third Circuit stated: "The district court did not decide any standard of care issue, and none is before us in a context sufficiently concrete and adversary for our decision at this time." 521 F.2d at 45.

Similarly, the holding of the Third Circuit in *Marant* was not addressed to the standard of care issue. Rather, *Marant* holds that a jury instruction which equates a shipowner's responsibility with a stevedore's responsibility in actions governed by 33 U.S.C. §905(b) is improper. A district court must instruct a jury that the major responsibility for longshoremen's safety is on the stevedore. Because the district court improperly instructed the jury, the Third Circuit in *Marant* remanded for a new trial consistent with its opinion.

Recently, this Court was presented with a Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit in *Anuszewski v. Dynamic Mariners Corp., Panama*, 540 F.2d 757 (4th Cir. 1976), *cert. denied*, 45 U.S.L.W. 3563 (U.S. Feb. 22, 1977) (No. 76-920). In *Anuszewski*, the Fourth Circuit, unlike the Third Circuit herein, decided the standard of care issue in connection with actions governed by 33 U.S.C. §905(b). Because the Fourth Circuit opinion is not an advisory opinion on the

standard of care issue, it would have been a more appropriate case for the grant of a Writ of Certiorari than the instant case. In denying the Writ in *Anuszewski*, this Court undoubtedly was cognizant that there are no conflicting decisions between the various courts of appeals that have specifically addressed and decided the standard of care issue in actions governed by 33 U.S.C. §905(b). Uniformly, these courts of appeals have held that analogous land-based principles of law form the proper reference for actions governed by 33 U.S.C. §905(b) and the appropriate analogy is to §343 and §343A of the RESTATEMENT (SECOND) OF TORTS.

Napoli, supra, was the first pronouncement by a court of appeals on the standard of care issue. There, the Second Circuit held that "where a shipowner has notice of an obviously dangerous condition, his duty of care to longshoremen exposed to such danger should be as set forth in §343A of the Restatement of Torts. . . ." 536 F.2d at 509. Similarly, in *Anuszewski, supra*, the Fourth Circuit observed that the district court "elected to follow the standard of the RESTATEMENT (SECOND) OF TORTS, §343 (1965)." 540 F.2d at 759. In affirming, the Fourth Circuit held: "In our opinion the court's choice of the *Restatement* standard was appropriate." 540 F.2d at 759. Most recently, in the companion cases of *Gay v. Ocean Transport & Trading, Ltd.* and *Guerra v. Bulk Transport Corp.*, — F.2d — (5th Cir. 1977) (A26-A41 of Petition for Writ of Certiorari herein), the Fifth Circuit joined the Second and Fourth Circuits in adopting §343 and §343A of the RESTATEMENT (SECOND) OF TORTS as the appropriate standard of care for actions under 33 U.S.C. §905(b). In so holding, the Fifth Circuit stated:

> Our brethern in the Second and Fourth Circuits have already faced the problem before us and have agreed that land-based principles are to guide in the establishment of a federal law. *Anuszewski v. Dynamic Mariners Corp.*, 540 F.2d 757 (4th Cir. 1976); *Napoli v. Hellenic Lines, Ltd.*, 536 F.2d 505 (2d Cir. 1976). Moreover, those circuits have both relied upon the Restatement (Second) of Torts for guidelines . . . In the interest of fulfilling the Congressional desire of uniformity, we, too, adopt the Restatement formulation. (A32-A33 of Petition for Writ of Certiorari herein).

Thereafter, the Fifth Circuit recited §§342, 343 and 343A of the RESTATEMENT (SECOND) OF TORTS and held: "These general standards should be utilized in the future to assure uniformity in cases brought under section 905(b) of the LHWCA to recover for injuries caused by the negligence of the vessel." (A34 of Petition for Writ of Certiorari herein). In concluding its Opinion, the Fifth Circuit stated: "In the interests of uniformity among the courts of this circuit and throughout the federal system, we have adopted the formulation of the Restatement (Second) of Torts §§342, 343 & 343A (1965)." (A41 of Petition for Writ of Certiorari herein).

When the Third Circuit is faced squarely with the standard of care issue "in a context sufficiently concrete and adversary" for a decision, it is conceivable that the Third Circuit will join with the Second, Fourth and Fifth Circuits in holding that §§343 and 343A of the RESTATEMENT (SECOND) OF TORTS are the proper land-based analogues for actions governed by 33 U.S.C. §905(b). In that eventuality, the uniformity between the courts of appeals on the standard of care issue will remain intact and there will be no need for this Court to expend valuable time and energy on an issue not in conflict between the courts of appeals. On the other hand, if a conflict develops in the future, undoubtedly this Court will be called upon to resolve the conflict at that time.

Respondent appreciates that a final judgment is not a prerequisite to this Court's jurisdiction on writ of certiorari. 7B J. Moore, Federal Practice §1254, at JC-366 (2d

ed. 1976). Theoretically, therefore, the writ can issue with respect to the grant of a new trial by the Third Circuit herein. Practically, however, the better practice would be to deny the writ to give the Third Circuit an opportunity to consider the standard of care issue. Possibly, the instant case or *Marant* on remand will provide the Third Circuit with an opportunity to address and decide the standard of care issue.

CONCLUSION

There is no conflict between the courts of appeals on either issue raised under Section I of the Petition for Writ of Certiorari. The issues raised in Sections II and III of the Petition are so devoid of merit and insignificant in the context of this Court's discretionary jurisdiction on writ of certiorari as to not require a response. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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